

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What is the nature and extent of claimant's injury and disability, if any, suffered as a result of his alleged accident on June 23, 1992?

(2) What additional compensation, if any, is due as a result of the claimant's alleged accidental injury?

(3) What additional temporary total disability compensation, if any, should be awarded to the claimant and what credit, if any, should be given to the respondent for payments made?

(4) Is claimant entitled to future medical treatment?

(5) Is the Kansas Workers Compensation Fund liable for any of the compensation due claimant?

(6) If it is found that the Workers Compensation Fund is liable, what part of the liability should be assessed against the Kansas Workers Compensation Fund?

(7) Is a credit under K.S.A. 44-510a appropriate?

(8) If the Workers Compensation Fund is not liable, should attorney fees be assessed against the respondent and in favor of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant has proven by preponderance of the credible evidence that he is entitled to a sixteen percent (16%) functional impairment to the body as a whole as a result of the injuries suffered on June 23, 1992.

Claimant began working for the respondent cutting plywood, setting concrete forms and carrying plywood on June 23, 1992 at 8:00 a.m. On that same date at 12:45 p.m. claimant slipped while carrying a sheet of plywood and fell to the ground injuring his low back. He felt an immediate sharp burning pain in his low back and into his right side. Within three or four days the pain had spread to the left lower extremity and into both legs and feet. Claimant went to the Shawnee Mission Emergency Room on June 26 and was referred to Dr. Jensen for treatment. A CAT scan was performed and claimant was recommended for physical therapy and cortisone shots. Claimant refused the cortisone shots and also refused a later recommended series of epidural blocks as claimant was in fear of needles.

Claimant was ultimately referred to Dr. Melvin D. Karges, a board certified physical medicine and rehabilitation specialist. Dr. Karges first saw claimant December 3, 1992 and last saw claimant August 24, 1993 involving a total of seven exams.

Claimant initially alleged complaints to his low back although X-rays both of the neck and back were taken. Dr. Karges diagnosed cervical and lumbar strain, myofascial pain complaints with no evidence of nerve root impingement and some mild degenerative disc changes. A main concern of the doctor was the fact the claimant had not been employed for approximately a year prior to beginning work with the respondent. The doctor indicated claimant was in a very bad state of de-conditioning. Physical therapy was recommended. Claimant was referred to a pain management program but only completed three out of the normal four weeks. He was removed from the program at the recommendation of the program director.

Dr. Karges recommended a lumbar sling support called a NADH chair, an inexpensive lumbar support that works in a standard chair. After release from the pain management program claimant entered vocational rehabilitation and attempted to return to work at Kemper Arena directing traffic in June or July of 1993. This job required that he stand for several hours a day but claimant was unable to tolerate same for more than two hours. He terminated his employment at Kemper and currently alleges he is incapable of any work.

Dr. Karges felt an element of secondary gain may be involved in claimant's restricted recovery. Apparently claimant was involved in the providing of certain home care for his family. His unwillingness to return to formal employment may partially stem from the fear of interference with his family relationships. The doctor also was concerned that claimant had no specific long term goals in mind other than pursuing social security disability.

Dr. Karges referred claimant on March 16, 1993 for a functional capacity assessment. The doctor felt claimant did not give maximum effort during the FCA and as a result of the self limiting nature of this test the doctor did not feel the FCA gave a true picture of claimant's abilities or capabilities. He did indicate that claimant's pain tolerance was low.

Claimant was rated at sixteen percent (16%) functional impairment to the body as a whole as a result of this injury. This rating included the claimant's cervical and lumbar problems and also included a host of pre-existing problems to cervical, thoracic, and lumbar spine. Of the sixteen percent (16%) impairment, two(2) to four(4) percent occurred as a result of the June 23, 1992 injury with the remainder being pre-existing. The doctor also opined that of the two(2) to four(4) percent only one percent (1%) functional impairment applied to the cervical spine.

Claimant was returned to work with restrictions that he perform light and sedentary work. The doctor further suggested claimant's sitting or standing be broken up rather than continuous and assessed a maximum lift of twenty pounds with repeat lifting of five to ten pounds. He recommended the claimant avoid bending and stooping repetitively.

The doctor was unaware of any prior functional impairment ratings provided to the claimant.

Dr. Karges opined that claimant would have additional impairment from the 1992 episode irregardless of the earlier problems. He used the 1992 CT scan as it relates to a 1991 CT scan as the primary basis for the apportionment of claimant's functional impairment. He agreed claimant did not have a normal back prior to his injury with respondent.

Claimant was referred to Michael Dreiling at the Menninger Return to Work Center for a vocational rehabilitation evaluation. Mr. Dreiling felt that claimant had suffered a ninety six percent (96%) loss of ability to perform work in the open labor market and a fifty six percent (56%) loss of wage earning capacity based upon his pre-injury salary of \$12.50 per hour and his post injury capabilities of \$5.50 per hour.

Mr Dreiling opined that, considering the claimant's pain complaints, claimant has no capacity to work and Mr. Dreiling anticipates claimant's loss of ability to perform work in the open labor market would to be one hundred percent (100%). Mr. Dreiling was provided only the medical records of Dr. Prostic which were not placed into evidence and the records of Dr. Karges. Mr. Dreiling's cross examination testimony indicates no restrictions were placed upon claimant by Dr. Prostic although the medical reports were not placed into evidence for review.

Mr. Dreiling assumed claimant had no prior limitations from a physical or functional standpoint during the evaluation. When asking about the claimant's injury in 1982 wherein he was assessed a fifteen (15%) functional impairment to the back Mr. Dreiling expressed ignorance. Likewise Mr. Dreiling was provided no information regarding claimant's 1985 injury to his neck and back wherein he was assessed a seven (7%) functional impairment nor the 1989 injury to his neck and the back wherein he was assessed a ten (10%) impairment. Mr. Dreiling was also not informed of the claimant's 1991 automobile accident with resulting injuries to his neck and back. The record indicates claimant was provided compensation for all of the above injuries. The three above discussed functional impairments stemmed from injuries suffered by claimant while working for Marriott Construction in 1982, E.H. Hall Construction in 1985, and Walton Construction in 1990.

Mr. Dreiling admitted if claimant had restrictions in 1985 they would modify the claimant's ninety-six percent (96%) loss of access to the open labor market. Apparently in 1985 claimant was restricted by Dr. Bolin from lifting in a bent position more than twenty pounds with a maximum lift of fifty pounds. While Mr. Dreiling was informed that claimant was on medication for anxiety attacks he was not provided information regarding the full extent of claimant's ongoing problems.

Claimant had apparently worked for Cox Construction, Kansas Construction, an Overland Park car wash and Schnuck's Grocery Store prior to his employment with the respondent Stelmach Construction Company. Brief periods of employment with these employers resulted in discontinuation of employment, all due to panic attacks. This information, had it been provided to Mr. Dreiling would have affected his opinion regarding claimant's loss of access to the open labor market. Mr. Dreiling had prior experience with anxiety attacks and opined that they can be very debilitating and may make employment at any level very questionable. He went to say there was no way to assess how the panic attacks would have affected the claimant's employment with Stelmach because claimant only worked for Stelmach for a few hours. The panic attacks could affect the claimant's ability to earn comparable wages. In discussing the panic attacks Mr. Dreiling questioned whether claimant would be capable of even earning the \$5.50 per hour used in his

assessment of claimant's loss of wage earning capacity. The panic attacks might possibly preclude claimant from employment altogether.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) finds burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in this case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App.2d, 782, 817 P.2d 212 (1991).

The only medical evidence in the record is that of Dr. Melvin D. Karges who assessed claimant a sixteen percent (16%) functional impairment to the body as a whole. This uncontradicted evidence appears reasonable and will not be disregarded as it has not been shown to be untrustworthy. Anderson v. Kingsley Sand and Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

K.S.A. 1992 Supp. 44-510e(a) defines functional impairment as:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

The Appeals Board deems the medical evidence of Dr. Karges to be competent medical evidence and finds the sixteen percent (16%) permanent partial impairment of function to the body as a whole to be appropriate and awards claimant same.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of the permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant argues a permanent partial general disability award would be appropriate in this matter based upon the opinion of Michael Dreiling. While it is true that uncontradicted evidence, which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy, see Anderson, supra, it is also true that the opinion of Michael Dreiling is tainted due to the intentional withholding of vital information by the claimant. This information dealing with claimant's past medical history, past work history, physical condition and panic attacks, would have altered Mr. Dreiling's opinion regarding claimant's ability to perform work in the open labor market and his ability to earn comparable wages. This renders his opinion untrustworthy.

As it is claimant's burden to prove the various conditions upon which claimant's right depends (See K.S.A. 44-501(a)) the rejection of Michael Dreiling's opinion renders claimant without an expert opinion regarding what if any permanent partial general work disability he would be entitled. The Appeals Board finds that due to claimant's failure to prove by a preponderance of the credible evidence his entitlement to a permanent partial general work disability, claimant is limited to his functional impairment of sixteen percent (16%) to the body as a whole.

The purpose of the Workers Compensation Fund is to encourage employment of person's handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765(1976).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffers a compensable work related injury. An employee is handicapped under the act if the employee is "afflicted with an impairment of such a character as to constitute a handicap in obtaining or retaining employment." Carter v. Kansas Gas & Electric Company, 5 Kan. Ap. 2d, 602, 621 P.2d 448 (1980).

In order for an employer to be relieved of liability, either in whole or partially, by the Workers Compensation Fund, it is the employers responsibility and burden to show that it hired or retained the handicapped employee after requiring knowledge of a pre-existing impairment. The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

When claimant went to work for the respondent he prepared an emergency notification form with his signature dated May 19, 1992. This form asked whether claimant had any bodily ailments in the past including heart trouble, diabetes, back trouble, epilepsy, etc. Claimant indicated he had no prior problems. When asked why he withheld the information from the respondent regarding his pre-existing back problems claimant indicated that, had he told the respondent of these problems, he would not have been hired. While he knew it was not correct to do so, he did not want the respondent to know of his preexisting problems.

K.S.A. 44-567(c) states in part:

"Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed

conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease;....(5) misrepresents that such employee does not have any mental, emotional or physical impairments, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation."

The claimant's intentional withholding of information regarding his preexisting back problems establishes a conclusive presumption that the employer had knowledge of claimant's preexisting impairment or handicap at the time claimant was employed by respondent.

K.S.A. 44-567(a)(2) states in part:

"Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the Director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the Director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of the award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund."

Dr. Karges assessed claimant a sixteen percent (16%) functional impairment of which he opines two(2) to (4) percent resulted from the 1992 injury. The Appeals Board finds an appropriate functional impairment for the 1992 injury would be four percent (4%). This would equate to twenty-five percent (25%) of claimant's total functional impairment. An equitable and reasonable proportionment of the award would be to assess seventy-five percent (75%) of the sixteen percent (16%) functional impairment to the Kansas Workers Compensation Fund and twenty-five percent (25%) of the sixteen percent (16%) functional impairment to the respondent. The injury described by claimant on June 23, 1992, would be sufficient to have produced a low back injury regardless of his preexisting condition but the resulting disability was contributed to by the pre-existing impairment, thus the apportionment of the award.

A credit under K.S.A 44-510a would be appropriate for the injury suffered by claimant on January 22, 1990. That award has 202.86 weeks remaining from the injury date of January 22, 1990. Credit will be assessed for claimant's preexisting award under K.S.A. 44-510a, at the rate of seventy-five percent (75%).

The record is void of persuasive evidence that the claimant is entitled to additional temporary total disability in excess of the 44 weeks already paid and same is denied.

In his August 24, 1993 medical report Dr. Karges releases claimant from his care with a recommendation that he obtain follow up care through his primary care physician.

While it is not indicated in the record that claimant is in need of substantial medical care in the future there is an indication from Dr. Karges that some type of maintenance care may be necessary. As such claimant is awarded future medical upon application to the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler shall be affirmed in part and reversed in part and claimant shall be awarded a sixteen percent (16%) functional impairment to the body as a whole against respondent and respondent's insurance carrier for the injuries suffered on June 23, 1992.

Claimant is entitled to 44 weeks temporary total disability compensation at the rate of \$289.00 per week or \$12,716.00 followed by 202 weeks permanent partial disability compensation at the reduced rate of \$22.30 per week totaling \$4,505.12 followed by 169 weeks of permanent partial disability compensation as the rate of \$51.20 per week totaling \$8,652.80 for a total award of \$25,873.92.

As of August 29, 1994, there would be due and owing to claimant, 44 weeks temporary total disability compensation at the \$289.00 per week in the amount of \$12,716.00 plus 70 weeks permanent partial disability compensation at the reduced rate of \$22.30 per week in the amount of \$1,561.00, for a total of \$14,277.00 due and owing in one lump sum less amounts previously paid.

Thereafter claimant will be entitled to 132 weeks permanent partial disability compensation at the reduced rate of \$22.30 per week totaling \$2,943.60 followed by 169 weeks permanent partial disability compensation at the rate of \$51.20 per week totaling \$8,652.30 to be paid until the award is fully satisfied or until further order of the Director.

Claimant is denied additional temporary total disability compensation.

Claimant is awarded future medical only upon application to and approval by the Workers Compensation Director.

The respondent shall be reimbursed from the Kansas Workers Compensation Fund for seventy five percent (75%) of all costs and expenses associated with the litigation of this case.

Pursuant to K.S.A. 44-536 the claimant's contract of employment is approved.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are assessed twenty-five percent (25%) against the respondent and respondent's insurance carrier and seventy-five percent (75%) against the Kansas Workers Compensation Fund as follows:

Metropolitan Court Reporters, Inc.	\$970.60
Hostetler & Associates, Inc.	\$179.20

IT IS SO ORDERED.

Dated this ____ day of October, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned disagree with the majority opinion in this case and would award work disability. The majority opinion completely discounts Mr. Dreiling's opinions on the grounds that he fails to account for pre-existing impairment resulting from previous injury. For the reasons stated in the concurring opinion in Flores v. Cameron Dry Wall, et al., Docket No. 152,948 (January 1994) we would consider it inappropriate to discount the work disability award based on the previous impairment. As the majority opinion in effect acknowledges, in cases of award for functional impairments the claimant is awarded the full disability including any previous impairment. In this case the sixteen (16%) percent awarded by the majority opinion includes disability clearly attributable to previous injuries. There appears no valid reason for treating work disability differently. Previous impairment is accounted for in fund liability and credit provisions in the Workers Compensation Act.

The majority opinion notes Mr. Dreiling testified that his opinion regarding reduced access to the labor market might have changed had he known of certain restrictions recommended by Dr. Bolin in 1985. Even if prior restrictions were to be deducted from work disability, Mr. Dreiling's opinion should not be disregarded on the basis of these restrictions. These were restrictions recommended in 1985 by a physician to whom claimant was referred for an evaluation on his behalf in connection with his workers compensation claim. Claimant testifies that he was not aware of those restrictions and the record does not establish those restrictions were continuing and realistic or valid in 1991 at the time of the current injury.

Finally, Mr. Dreiling testified that knowledge of the prior restrictions would not affect his opinion regarding reduced ability to earning a comparable wage. To determine reduced ability to earn a wage, he compares what claimant was in fact earning at the time of the accident with what he believed claimant would be able to earning after the accident. He concluded there was a fifty-six (56%) percent reduction. At a minimum, this factor ought to be given weight in determining the award.

The record reflects that the treating physician, Dr. Melvin D. Karges, has recommended that claimant lift no more than twenty (20) pounds with maximum frequent lifting of five (5) to ten (10) pounds and that he should avoid bending and squatting. Dr. Karges has also indicated that in an eight (8) hour work day claimant can stand or walk two (2) hours, sit six (6) hours and drive one (1) hour. He suggested that claimant be limited to sedentary work. Based on these restrictions Mr. Dreiling suggested that the claimant's loss of access to the labor market is ninety-six (96%) percent. He has also given an opinion that claimant will be limited to work at approximately \$5.00 per hour post injury. From this he calculates a 56% reduction in ability to earn a wage. Mr. Dreiling also indicates that if one gives full credibility to claimant's complaints of pain, claimant is essentially unemployable. Given these factors the sixteen (16%) percent awarded by the majority appears to be inadequate. An award which weighs equally the fifty-six (56%) percent wage access, ninety-six (96%) percent loss of labor market access would be appropriate.

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